No. 82-1150

Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

October Term, 1982

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL E. MERRILL
MERRILL & SCHULTZ
Attorneys at Law

RAYMOND J. LaJUENESSE, JR., ESQ.
National Right to Work Legal
Defense Foundation

By: MICHAEL E. MERRILL
4420 Hotel Circle Court, Suite 345
San Diego, California 92108
(619) 293-3722

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

TABLE OF CONTENTS

	Page
HISTORY AND ANALYSIS OF THE *BECK* LITIGATION	2
THE DIRECT CONFLICTS BETWEEN *BECK* AND THE MAJORITY DECISION IN *ELLIS*	5
CONCLUSION	7
APPENDIX	9

TABLE OF AUTHORITIES

	Page
Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977)	2,5,6
Beck v. Communication Workers of America, 468 F.Supp. 93 (D. Md. 1979)	1,2
Beck v. Communication Workers of America, 1980 Daily Lab. Rep. No. 166, D-1 (D. Md. Aug. 18, 1980)	2,6
Beck v. Communication Workers of America, 106 L.R.R.M. 2323 (D. Md. 1981)	4
Beck v. Communication Workers of America, Civ. No. M-76-839 (D. Md. Sept. 14, 1981)	4
Beck v. Communication Workers of America, 1983 Daily Lab. Rep. No. 48, D-1 (D. Md. Mar. 4, 1983)	1,4,5,7
Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963)	3
Buckley v. Valeo, 424 U.S. 1 (1976)	5
International Ass'n of Machinists v. Street, 367 U.S. 740 (1961)	5

MISCELLANEOUS

Supreme Court Rule 22.6	1
United States Constitution, First Amendment	2

No. 82-1150

IN THE

Supreme Court of the United States

October Term, 1982

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Howard Ellis, *et al.*, and Allen L. Fails, *et al.*, file this supplemental brief pursuant to Sup. Ct. R. 22.6, to bring to this Court's attention a new decision in *Beck v. Communication Workers of America*, 1983 Daily Lab. Rep. No. 48, D-1 (D. Md. Mar. 4, 1983), issued subsequent to the filing of the petition in this case on January 7, 1983. The district court's prior decision in *Beck v. Communication Workers of America*, 468 F.Supp. 93 (D. Md. 1979), was cited to this Court in the

petition as one of the federal district court decisions which conflict with the Ninth Circuit's majority opinion in this case. On March 4, 1983, the district court issued another decision in *Beck* which sharpens the conflict between that case and the majority decision in *Ellis*.

HISTORY AND ANALYSIS OF THE *BECK* LITIGATION

The complaint in *Beck* was filed on June 4, 1976, by eighteen employees of various Maryland subsidiaries of the American Telephone and Telegraph Company and the Chesapeake and Potomac Telephone Company who were employed under collective bargaining agreements between their employers and the Communication Workers of America ("CWA"). The plaintiffs, nonmembers of CWA, alleged that a percentage of their compelled agency fees were spent over their objection for purposes other than collective bargaining, contract administration, and grievance adjustment in violation of the First Amendment.

On March 16, 1979, the court entered its decision and declaratory judgment. Drawing from this Court's decision in *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), the district court held that CWA had collected and continued to collect agency shop fees from plaintiffs in amounts beyond that allocable to collective bargaining, contract administration, and grievance adjustment. This conduct was held to violate the plaintiffs' First Amendment rights. 468 F.Supp. at 97. The district court referred to a special master the issue of the amount of plaintiffs' agency fees spent for purposes other than collective bargaining, contract administration, and grievance adjustment. On this issue, the burden of proof was placed upon CWA. *Id.*

On March 3, 1979, the district court appointed Special Master Wilson K. Barnes, a retired judge from Maryland's Court of Appeals. Proceedings before the special master commenced on May 15, 1979, and con sumed twenty-seven days of hearing and one full day of argument of counsel. The record of testimony consisted of 3,844 pages of transcript. More than 2,100 documentary exhibits were admitted.

On August 18, 1980, Special Master Barnes filed a detailed forty-two page written report containing his findings of fact and conclusions of law. *Beck v. Communication Workers of America*, 1980 Daily Lab. Rep. No. 166, D-1 (D. Md. Aug. 18, 1980).

The special master confirmed the district court's decision that *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1963), required that CWA carry the burden of proof in demonstrating the amount of permissible expenditures and held that the burden must be met by "clear and convincing evidence." 1980 Daily Lab. Rep. No. 166 at D-1, D-3. The special master defined precisely the terms "collective bargaining," "contract administration," and "grievance adjustment." He set forth the following for determining whether expenditures which are not clearly embraced within collective bargaining, contract administration, and grievance adjustment were permissible: an expenditure is permissible only if it "*directly relates to* and is *reasonably necessary for the proper effectuation of*, collective bargaining, contract administration and grievance adjustment." *Id.* at D-4 (emphasis in original). The special master initially found that a variety of union expenditures were impermissible, including expenditures for political purposes, community services, labor legislation, and organizing. *Id.* at D-5.

Various other items claimed by CWA to be expenditures for collective bargaining, contract administration, and grievance adjustment also were found impermissible in whole or in part. The disallowance of these items was based primarily on the finding that, because CWA failed to maintain its records in accordance with generally accepted accounting principles, it had failed to meet its burden of proof that the expenditures were permissible. *Id.* at D-8.

Although CWA contended that one hundred percent (100%) of its expenditures were chargeable except political expenditures amounting to less than two percent (2%) of the fees for the years 1977 through 1980, the special master concluded that eighty-one percent (81%) of CWA's expenditures of agency fees were impermissible. Therefore, he required a refund to plaintiffs of eighty-one percent (81%) of their agency fees. A permanent injunction was recommended restraining CWA from charging or collecting in excess of nineteen percent (19%) of the amount of regular dues, assessments, or other payments required of union members. That percentage was subject to modification upon a proper showing by CWA that a greater portion was chargeable to plaintiffs. *Id.* at D-13. (App. at 3a)*

On motion of CWA, the district court entered an order on January 19, 1981, recommitting the matter to the special master: (1) to determine

* "(App. at ____)" refers to pages of the appendix to this brief.

whether the union's allegedly new record-keeping policies should alter the previous factual findings of the special master, and (2) to fashion a final injunction in the case. *Beck v. Communication Workers of America*, 106 L.R.R.M. 2323 (D. Md. 1981).

On recommittal, the special master held a number of conferences and hearings resulting in over 800 additional pages of transcript, and receipt of another 2,313 exhibits, in addition to extensive expert reports on CWA's record-keeping and accounting systems.

On September 14, 1981, Special Master Barnes issued his fifty-three page supplemental report. *Beck v. Communication Workers of America*, Civ. No. M-76-839 (D. Md. Sept. 14, 1981). The special master found that no facts had been presented to change the previously determined result that eighty-one percent (81%) of CWA's expenditures were for impermissible purposes. Slip op. at 50. (App. at 5a)

All other pertinent findings and conclusions in the special master's original report were reaffirmed and incorporated into the supplemental report, except that the special master modified the previous recommendation for a permanent injunction. In his supplemental report, he proposed that CWA be permanently enjoined from prospectively charging or collecting from plaintiffs for each year an amount certified as impermissible by an independent certified public accountant subject to objections by the plaintiffs. The injunction also included provisions requiring the union to place in an interest-bearing escrow account a portion of the agency fees paid by plaintiffs equal to twice the amount determined in the previous fiscal year to be impermissible. It required CWA to pay plaintiffs' counsel and expert fees in connection with a review of the certified impermissible amount. *Id.* at 51-52. (App. at 7a-8a)

The parties filed objections, motions, and memoranda directed to the supplemental report. The district court on March 4, 1983, issued its memorandum and order for judgment. *Beck v. Communication Workers of America*, 1983 Daily Lab. Rep. No. 48, D-1 (D. Md. Mar. 4, 1983) (App. at 10a-22a).

With the modifications expressed in its own opinion, the district court adopted the special master's original and supplemental reports. *Id.* at D-4 (App. at 21a)

The district court specifically held that:

(1) The special master's supplemental report regarding the calculation of permissible versus impermissible expenditures must be applied to the local unions as well as the international union. Application of the same percentages was required due to the local unions' failure to meet the burden of proof that any other percentage was appropriate. *Id.* at D-2 (App. at 15a-16a).

(2) The evidence offered by CWA failed to prove that the fees spent for organizational purposes were used "to benefit collective bargaining *in this case.*" *Id.* at D-2 (App. at 16a) (emphasis in original).

(3) CWA's burden of proof was that of persuasion, not merely that of going forward with the evidence. Relying on *Abood* and *Buckley v. Valeo*, 424 U.S. 1 (1976), the district court concluded that the burden must be met by "clear and convincing evidence." 1983 Daily Lab. Rep. No. 48 at D-2, D-3 (App. at 16a-18a).

(4) Where CWA did not maintain adequate time records as suggested in *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), and *Allen*, the union failed to meet its burden of proof on permissible expenditures. 1983 Daily Lab. Rep. No. 48 at D-3 (App. at 18a).

Adjusting some simple mathematical errors in the special master's report to arrive at total impermissible expenditures of seventy-nine percent (79%), the district court concluded that judgment should be entered for plaintiffs in an amount equal to seventy-nine percent (79%) of the agency fees paid by plaintiffs from January 1, 1976, through March 31, 1983; that plaintiffs should also be granted the permanent injunctive relief set forth in the special master's supplemental report; and that CWA should pay one hundred percent (100%) of the costs, including compensation of the special master. *Id.* at D-3, D-4 (App. at 21a-22a).

THE DIRECT CONFLICTS BETWEEN *BECK* AND THE MAJORITY DECISION IN *ELLIS*

The district court's March 4, 1983 decision (including its incorporation of the special master's reports) places *Beck* in direct conflict with the majority decision in *Ellis* on each of the three issues as to which review is sought in this case.

First, *Beck* articulated a precise rule consistent with *Abood*, for the line between permissible and impermissible uses of compulsory fees: only an expenditure which "*directly relates to* and is *reasonably necessary for the proper effectuation of*, collective bargaining, contract administration and grievance adjustment" may be charged to dissenters. 1980 Daily Lab. Rep. No. 166 at D-4. On the other hand, the majority decision in *Ellis* applied a novel, murky test of chargeability: that expenditures need only be somehow "germane to the union's work in the realm of collective bargaining." 685 F.2d at 1072.

Second, the permanent injunctive relief in *Beck* requires CWA to escrow a portion of the agency fees paid by plaintiffs equal to twice the amount determined in the previous fiscal year to be impermissible (and thus refrain from spending the compulsory fees) until an amount certified to be impermissible has been approved. The amount certified as impermissible is subject to close scrutiny by plaintiffs' counsel and experts, and to possible court review, with CWA bearing the costs of plaintiffs' counsel and experts for services in connection with that scrutiny (App. at 7a-8a, adopted at 21a). The majority decision in *Ellis*, however, ignored the prior restraint inherent in spending dissenters' fees before certification of permissible expenditures, and endorsed an unmonitored rebate scheme permitting collection and expenditure of compulsory fees for impermissible purposes if some portion of the impermissible expenditures is ultimately rebated. 685 F.2d at 1069-70.

Third, *Beck* imposed the "clear and convincing evidence" standard required in cases involving fundamental constitutional rights and demanded that the requisite burden of proof be met from records maintained in accordance with generally accepted accounting principles. (App. at 18a). In contrast, the majority decision in *Ellis* required proof by only a preponderance of the evidence and held generally accepted accounting principles to be irrelevant to the union's burden of proof. 685 F.2d at 1070-71.

CONCLUSION

This new decision in *Beck* further demonstrates that the questions presented for review in this case are important questions of federal law which have not been, but should be, settled by this Court. The Court, therefore, should grant this petition for certiorari.

Respectfully submitted,

Michael E. Merrill

Counsel for Petitioners

APPENDIX

Report of the Special Master

Filed in the U.S. District Court
for the District of Maryland on August 18, 1980

1980 Daily Lab. Rep. No. 166, D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

HARRY E. BECK, JR., et al *

Plaintiffs *

v. * Civil No. M-76-839

COMMUNICATIONS WORKERS OF AMERICA (CWA), et al *

Defendants *

* * * * * * *

REPORT OF WILSON K. BARNES, SPECIAL MASTER

* * *

Findings of Fact

The Special Master makes the following findings of fact:

1. The items of expenditure by CWA during the fiscal year beginning April 1, 1977, and ending March 31, 1978 (Fiscal 1977-78), are characteristic of the expenditures of CWA for all periods from and after January 1, 1976.

2. The total expenditures by CWA during Fiscal 1977-78 are $29,240,000.

3. The expenditures by CWA for Fiscal 1977-78 for Administrative purposes amounted to $8,065,000.

4. Of the amount of expenditures by CWA for Fiscal 1977-78 for Administrative purposes of $8,065,000, 24%, or $1,212,000, were permissible expenditures as calculated on Schedule E, hereto attached, and should be allocated to the total of permissible items of expenditure for Collective Bargaining, Grievance Adjustment and Contract Administration.

5. The total expenditures for the 10 categories set forth in Appendix C, hereto attached, of $4,424,000, together with the amount of $1,212,000 mentioned in Finding of Fact No. 4, supra, a total of $5,636,000, are directly connected with, and are reasonably necessary for the effectuation of collective bargaining, grievance adjustment and contract administration and are permissible items of expenditure.

6. The percentage of total permissible expenditures of the total expenditures of CWA during Fiscal 1977-78 is 19%, as calculated on Schedule E, hereto attached.

7. The percentage of total impermissible expenditures of CWA during Fiscal 1977-78 is 81%, as calculated on Schedule E, hereto attached.

Conclusions of Law

The Special Master, in addition to the Conclusions of Law heretofore made by the Court, submits the following Conclusions of Law:

1. It is proper for the Special Master to use as a rule or guide in determining whether or not items of expenditure by CWA are permissible and properly chargeable against the amounts paid by the Plaintiffs as Agency Fee Payors to CWA that such item of expenditure is directly connected with and is necessary for the effectuation of collective bargaining, grievance adjustment and contract administration.

2. "Collective Bargaining, Grievance Adjustment and Contract Administration" are properly defined as set forth in Pages 10 and 11 of this Report.

3. It is proper for the Special Master to use the expenditure of CWA for Fiscal 1977-78 as characteristic of the other periods of time involved in this action and to use such expenditures for the calculation of the percentage of permissible expenditures which may properly be charged to

the Plaintiffs, as Agency Fee Payors of CWA, and the percentage of impermissible expenditures which may not be so charged.

4. CWA must refund to the Plaintiffs listed in Schedule F, hereto attached, 81% of the amounts heretofore paid by them to CWA as Agency Fee Payors including the amounts listed in Schedule F and such additional amounts up to the date of filing this Report as the Plaintiffs may establish and a monetary judgment for those amounts should be entered by the Court.

5. The Plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge and collect from the Plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to the Plaintiffs as Agency Fee Payors.

6. The items of expenditure mentioned under the heading "Allocation of Costs" on page 39 of this Report are properly taxable as costs in this case and those costs, as well as any other costs in the case will be paid 81% by the Defendants and 19% by the Plaintiffs.

7. Claims for counsel fees or punitive damages are not passed upon by the Special Master and the filing of the Report is without prejudice to, or waiver of, any such claims.

Recommendations by the Special Master to the Court

The Special Master recommends to the Court that:

1. The Report of the Special Master be adopted and the aforegoing Findings of Fact and Conclusions of Law be adopted, applied and confirmed by the Court.

2. In view of the length of the Report of the Special Master and the substantial number of issues, exhibits and figures involved, the time within which the parties may file exceptions, if any, to the Report be enlarged from the 10 day period provided for in Federal Rule 53(e)(2), to

30 days from the date of filing the Report in the Court. A form of suggested order is submitted herewith for the recommended extention time.

Respectfully Submitted

Dated: August 18, 1980

Wilson K. Barnes, Special Master

**Supplemental Report of Special Master
Filed in the U.S. District Court
for the District of Maryland on September 14, 1981**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

HARRY E. BECK, JR., et al. *

Plaintiffs *

v. * CIVIL ACTION NO. M-76-839

COMMUNICATIONS WORKERS OF AMERICA, et al. *

Defendants *

* * * * * * * * * *

SUPPLEMENTAL REPORT OF WILSON K. BARNES,
SPECIAL MASTER

* * *

Findings of Fact

The Special Master makes the following findings of fact:

1. The Special Master reaffirms Findings of Fact Nos. 1-7, inclusive, appearing on page 40 of the Original Report.

2. No facts have been presented in the hearings in Phase II which, at the time of the filing of this Supplemental Report, change the percentage of 19 percent of the total permissible or retainable expenditures or of 81 percent of impermissible or non-retainable expenditures of the CWA Defendants as calculated on Schedule E attached to the Original Report as found by the Special Master in Findings of Fact Nos. 6 and 7 in the Original Report.

Conclusions of Law

The Special Master, in addition to the Conclusions of Law heretofore made by the Court, submits the following Conclusions of Law:

1. The Special Master reaffirms and incorporates here the Conclusions of Law Nos. 1, 2, 3 and 4 set forth on page 41 of the Original Report.

2. In *addition* to Conclusion of Law No. 4 appearing on page 41 of the Original Report, the Special Master presents the following Conclusion of Law:

4-A. CWA must refund to the Plaintiffs in Schedule F attached to the Original Report, in addition to the amounts payable to them as provided in Conclusion of Law No. 4 on page 41 of the Original Report, 81 percent of the amounts paid by them to CWA as Agency Fee Payors from the time of filing of the Original Report on August 18, 1980 and the date of filing of this Supplemental Report to and including July 31, 1981 as the Plaintiffs may establish and a monetary judgment for those amounts should be entered by the Court in addition to the amounts mentioned in Conclusion of Law No. 4 on page 41 of the Original Report. The CWA Defendants shall pay such amount found to be due to the Plaintiffs into, and hold in, an interest-bearing escrow account, and in addition, shall pay at the end of each fiscal year of CWA subsequent to the filing of this Supplemental Report, the portion of the agency fees paid by each Plaintiff during each succeeding fiscal year, an amount equal to twice the amount determined in the previous fiscal year to be non-retainable, all pending the determination called for in Conclusion of Law No. 5, *infra*.

3. The Special Master adds, as a result of the testimony, exhibits, authorities cited and arguments made by counsel for the respective parties, the following additional Conclusion of Law:

4-B. The new system of CWA cost accounting, timekeeping and record-keeping, subject to the changes and additions recommended by the Special Master on page 45 of the Supplemental Report are, prima facie, a proper means for the CWA Defendants to seek to meet the burden of proof to which they are now subject by virtue of the prior holdings of the Court and of the Special Master in the Original Report for determining the percentage of agency fees paid by the Plaintiffs as

Agency Fee Payors that is retainable by CWA and the percentage which is not retainable.

4. The Special Master modifies Conclusion of Law No. 5 on page 41 of the Original Report to read as follows:

5. The Plaintiffs listed in Schedule F attached to the Original Report are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge and collect from the Plaintiffs for the period August 1, 1981 to March 31, 1982 and for each fiscal year of CWA thereafter, the amount certified as non-retainable by an independent Certified Public Accountant commissioned by the CWA Defendants who has used the new system of record-keeping and allocations designed by the experts of CWA as set forth on page 43 of this Supplemental Report after supplying certain defects and omissions set forth on pages 45 and 46 of this Supplemental Report and subject to the additional provisions for monitoring set forth on pages 46 to 48 of this Supplemental Report. The Plaintiffs through their counsel and an expert or experts selected by him shall have the right upon the issuance of such report to review the workpapers of the Certified Public Acountant and of the time recording and sampling expert who prepared the report, and who monitored the operation of the new system during the period involved. If, within 45 days from the date on which the Plaintiffs have been granted access to those papers as above provided, counsel and the experts of the Plaintiffs disagree with the methods used in the preparation of and the conclusions stated in the report, they shall file with the Court a statement indicating the basis of such disagreement. If no such statement is filed, the CWA Defendants on the 46th day after the issuance of the report shall pay to the Plaintiffs the amount stated in the report. If such a statement is filed, the Court on the papers or after such hearing as the Court may deem proper shall determine the non-retainable amount. The CWA Defendants shall each fiscal year hold in an interest-bearing escrow account a portion of the agency fees paid by each Plaintiff equal to twice the amount determined in the previous fiscal year to be non-retainable pending the determination above set forth. The CWA Defendants, as part of the monitoring expense for their new system, shall pay to the Plaintiffs an amount of money representing the reasonable value of the services of counsel and the experts of the Plaintiffs in connection with the review from time to time as above set forth. If the parties cannot agree upon the amount to be paid for such services, the Plaintiffs may submit by motion the question of the amount of such reasonable compensation to the Court for

determination, which, after hearing the CWA Defendants, will award a monetary judgment to the Plaintiffs for the amount determined by the Court.

6. The Special Master reaffirms and incorporates here Conclusion of Law No. 6 as set forth on page 41 of the Original Report and in addition thereto adds the following:

All taxable costs which have accrued in the case since the filing of the Original Report on August 18, 1980 and the date of the filing of this Supplemental Report shall be paid 81 percent by the CWA Defendants and 19 percent by the Plaintiffs.

7. The Special Master reaffirms and incorporates here Conclusion of Law No. 7 as set forth on page 42 of the Original Report.

8. The Special Master does not decide the request of the Plaintiffs for the allowance of counsel fees for the reasons set forth on pages 49-50 of this Supplemental Report and without prejudice to any proceeding in the Court upon this issue from the decision of the Special Master not to pass upon this issue.

Recommendations by the Special Master to the Court

The Special Master recommends to the Court that:

1. This Supplemental Report, as well as the Original Report, be adopted and the aforegoing Findings of Fact and Conclusions of Law, as well as the Findings of Fact and Conclusions of Law in the Original Report, except as such Conclusions of Law shall have been modified or amplified by the Conclusions of Law in this Supplemental Report, be adopted, applied and confirmed by the Court.

2. In view of the length of this Supplemental Report of the Special Master and the substantial number of issues, exhibits and pages of testimony involved, the time within which the parties may file exceptions, if any, to the Supplemental Report be enlarged from the ten-day period provided for in Federal Rule 53(e)(2) to thirty days from the date of filing

the Supplemental Report in the Court. A form of suggested order is submitted herewith for the recommended extension of time.

Respectfully submitted,

Dated: September 14, 1981

Wilson K. Barnes, Special Master

Memorandum and Order of the U.S. District Court for the District of Maryland Issued on March 4, 1983

1983 Daily Lab. Rep. No. 48, D-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

HARRY E. BECK, JR., et al. Plaintiffs v. COMMUNICATION WORKERS OF AMERICA, et al. Defendants	CIVIL ACTION NO. M-76-839

MEMORANDUM AND ORDER

STATEMENT OF THE CASE

The complaint in this action was filed on June 4, 1976 by eighteen employees of various Maryland subsidiaries of the American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P). The plaintiffs are employed under collective bargaining agreements between their employers and the Communication Workers of America (CWA). Under the contracts, CWA, CWA District II, and CWA Locals 2100, 2101, 2108 and 2110 are the exclusive representatives of the employees. Plaintiffs, while they have not sought to become members of CWA, are subject to the collective bargaining agreements which require that they pay to CWA, as a condition of employment, an amount equal to the periodic dues and assessments of the union.

The plaintiffs have alleged that their agency fees are, at least in part, used to support partisan political or ideological causes unrelated to collective bargaining. The plaintiffs have objected to such expenditures and to other non-collective bargaining expenditures, alleging a violation of their First Amendment right to express themselves without governmental control and without prior governmental restraint.

On March 16, 1979, the late C. Stanely Blair, a judge of this court, held that the plaintiff agency fee payors were entitled to a declaratory judgment that the requirement of the payment by them of fees to finance activities other than "collective bargaining, contract administration and grievance adjustment," was improper. The judgment order referred the case to a special master for determination of "the percentage of the defendant's budget dispersed for purposes other than the three permissible ones." (Paper No. 71). The judgment included provisions (1) that if the parties were unable to agree upon a master, the court would appoint one; (2) that if the parties were unable to agree on an equitable allocation of the cost of reference, the court would direct the master to make a recommendation; (3) that once the percentage of the defendant's budget dispersed for impermissible purposes had been determined, the plaintiffs would be entitled to a refund of the excess paid by the plaintiffs for the period since January 1, 1976; and (4) that the judgment was conditioned on the plaintiffs' dismissal of the AFL-CIO and its named affiliates as defendants. The AFL-CIO and its named affiliates were dismissed, with prejudice, on March 30, 1979. The parties were not able to agree upon a master, and on May 3, 1979, Judge Blair entered an Order appointing Honorable Wilson K. Barnes as Special Master.

In his March 16, 1979 Memorandum and Order Judge Blair held as follows:

> "(1) Pursuant to the Agency Shop Clause in its collective bargaining agreement with plaintiffs' employees, the defendant, CWA, has collected and continues to collect from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment;
>
> (2) That such collection by the defendant violates the First Amendment rights of the plaintiffs."

(Paper No. 70). The Special Master, on reference, was ordered to make the following determination:

> "The Special Master shall exercise those powers conferred by this Court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, (3) grievance adjustment, all in accordance with the conclusion of law heretofore reached by the undersigned judge in this proceeding."

(Paper No. 73).

On August 18, 1980, Special Master Barnes filed a written report (Paper No. 114), setting forth his findings of fact and conclusions of law in response to the referral order. The defendants subsequently filed a motion to recommit this matter to the Special Master pursuant to Rule 53(e). The motion was granted by the undersigned judge (Paper No. 130) on January 19, 1981.

The first issue resubmitted to the Special Master dealt with his findings relating to the obligations of the Local Unions. The court concluded:

> "The Special Master's report, however, is devoid of any specific findings or conclusions regarding the activities of the Local Unions. Given the fact that the Local Unions retain 60% of the fees in question, the court finds that this matter should be referred back to the Special Master either for clarification or further findings concerning the Local Unions. If the findings of the present report were intended to encompass the defendant locals, the basis of that holding should be set forth. If, on the other hand, the report relates only to the portion of the fees expended by defendant CWA, the Special Master should submit further findings on the following issues:
>
> > (1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;

> (2) What percentage of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous Order of this court."

Further testimony on those issues was not required by the court unless Judge Barnes, in his role as Special Master, deemed it appropriate.

The second issue before the Special Master on recommital involved his determination of future injunctive relief. The Special Master's original report contained the following recommendation:

> "The plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge or collect from the plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA by such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to plaintiffs as Agency Fee Payors."

The court granted the defendants' motion to recommit the matter to a Special Master to enable the defendants to present additional evidence designed to modify the percentage figure for future injunctive relief. Specifically, the defendants sought to "present evidence to the Special Master of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures on collective bargaining, contract administration, and grievance adjustment." (Paper No. 130 at 6). The court held that "[t]he injunctive relief regarding future collection should, however, be more flexible," (Paper No. 13 at 6), than that proposed in the Special Master's original report.

On remand the Special Master was requested specifically to submit additional findings on the following issues:

> "(1) Do the unions' current record keeping policies in any way alter the factual finding previously submitted to the court?

(2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissible activities?

(3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?

(4) How should the final injunction be framed in order to accomplish the objection (sic) set forth in this order and the prior ones in this action?"

(Paper No. 130 at 7).

Finally, the Special Master was required to clarify his original findings with respect to clerical errors. (Paper No. 130 at 8).

On re-reference the Special Master held a series of conferences and hearings on the questions submitted. Detailed briefs were prepared by both sides and discovery was reinstituted, resulting in over 800 additional pages of transcript. The plaintiffs introduced 2,296 exhibits; the defendants introduced 17 and additionally introduced extensive expert reports on CWA's proposed record keeping and accounting systems.

Special Master Barnes submitted his supplementary report (Paper No. 180) on September 18, 1981. The parties filed their objections to the report (Paper Nos. 184-86) and the defendants filed motions for action on the supplementary report (Papers 196, 197, 201). The plaintiffs responded to these motions (Paper No. 203). Finally, the defendants filed for leave to file a motion for judgment (Paper No. 204) with supporting memoranda (Papers 207, 208). The plaintiffs have opposed that motion (Paper Nos. 205, 208) and the defendants have replied (Papers 206, 210). The court has considered the motions and memoranda of the parties and has concluded that an oral hearing on these matters is not necessary. Local Rule 6(E).

OBJECTIONS TO THE REPORT OF THE SPECIAL MASTER

A. Application of the Original Report to the Local Unions

With regard to the first issue re-submitted to the Special Master, *i.e.*, findings related to the obligations of the local unions, the local unions, but not the plaintiffs, have objected (Paper No. 186) to the supplemental report. They object on the ground that the supplemental report, like the original report, allegedly fails to make findings with respect to the local unions.

"In an action to be tried without a jury the court shall accept the Master's findings of fact unless clearly erroneous," Fed. R. Civ. P. 53(e)(2). Thus, the task of the district court here in reviewing the Special Master's findings of fact is essentially the same task as faces an appellate court reviewing the findings of fact of a district court. *See* 5A *Moore's Federal Practice*, ¶ 53.12[4] at 53-117 & 119. (2d. ed. 1982). Findings based on oral testimony, based partially on the fact finders' evaluation of witnesses' demeanor and credibility, are entitled to greater deference than are findings based on documentary and other non-demeanor evidence. *Id.* at 53-119. This is particularly true in a case such as this, where the testimony of numerous experts was so crucial.

In his supplemental report, the Special Master has made explicit his intention in the original report that the calculations of applicable percentages of permissible and impermissible expenditures by CWA should be applied also to the four local unions. Furthermore, the Special Master has complied with the court's request that the basis of his holding relative to the local unions be made specific. In pages 2 through 4 of the supplemental report, he explained that the local unions had failed to meet their burden of proof with respect to allocation of costs and that only by evaluating the evidence in the light most favorable to them could the Special Master justify an allocation equal to that of the CWA. The local unions' objection that the Special Master's findings are not supported by evidence (Paper Nos. 186 and 196) is without merit for it was their burden to produce evidence which the Special Master expressly found they failed to do. Furthermore, although the local unions now argue the remedy applied to the CWA is impracticable to apply to them because of their smaller staffs and responsibilities, they failed to pursue this matter before the Special Master on recommittal. This court cannot say that the Special Master's findings are clearly erroneous on this issue. Therefore, the Special Master's supplemental report with respect to the calculation

of permissible expenditures by the local union will be affirmed to the same extent it is affirmed for the CWA.

B. Organizational Fees

Defendant CWA objects to the Special Master's finding that the expenses of organization are not permissible. The defendant relies principally on *American Steel Foundries v. Tri-City Central Trades*, 257 U.S. 184, 209 (1921), in which the Court outlined the importance of organizational activities to a healthy union. It is not disputed that organizing is an important function of the unions, nor that these activities may indirectly benefit unions' collective bargaining positions. The evidence before the Special Master, however, failed to support the conclusion that the fees attributable to organizing were used to benefit collective bargaining *in this case*. This is not to say that with proper evidentiary support a different conclusion would not be reached on other facts. *See Ellis v. Brotherhood of Railway Clerks*, 685 F.2d 1065 (9th Cir. 1982); *Browne v. Milwaukee Board of School Directors*, (Wisconsin Employment Relations Commission, Dec. No. 18408 (Feb. 3, 1982).

C. Burden of Proof

The CWA contends that the Special Master erred in imposing on the defendants the burden of proving permissible expenditures by clear and convincing evidence. Their first argument is that the defendant's burden as imposed by *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), should merely be one of going forward with the evidence, not one of persuasion. In support of this argument they cite the Title VII case of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The opinion of Judge Blair (Paper No. 70) leaves no doubt that the burden placed on the defendants was one of persuasion. For this reason alone, if for no other, the court believes the doctrine of the law of the case dictates that the burden not be shifted at this time. Additionally, *Burdine*, on which the defendants rely, was not decided at the time of Judge Blair's decision. In any event, *Burdine* involved a Title VII claim and no such claims have been raised here. This court does not agree with the defendants' broad reading of *Burdine* which would apparently

reassign to all plaintiffs in all phases of all actions the burden of proof. There is nothing in *Burdine* to justify its application beyond Title VII.

In addition, the defendant CWA argues that the Special Master erred in imposing a standard of "clear and convincing" evidence. Although this court agrees with the defendant and the Ninth Circuit, *Ellis v. Brotherhood of Railway Clerks, supra* at 1070, that the Special Master erred in relying on *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), to support his conclusion that the appropriate standard was "clear and convincing evidence," the court disagrees with the conclusion that it was error to apply the standard at all.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), the Supreme Court cited *Buckley v. Valeo*, 424 U.S. 1 (1976), for the proposition that:

> "Contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals,' the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interest.'"

431 U.S. at 234 (*quoting* from *Buckley*; citations omitted).

The Court then concluded that there was no significant difference for First Amendment purposes between limiting a campaign contribution and compelling contribution.

> "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced. . . ."

431 U.S. at 234 through 235 (footnotes omitted).

What is significant is that the Supreme Court held the expenditure limitations at issue in *Buckley* to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression," 424 U.S. at 44-45. *See* 424 U.S. at 16. This was consistent with numerous prior decisions determining that prior restraints on First Amendment freedoms carry a heavy presumption against their validity. *See, e.g., Heller v. New York*, 413 U.S. 491 (1973); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Tetel Film Corp. v. Cusack*, 390 U.S. 139 (1968). Given the basic First Amendment freedoms at issue in this case and the solicitude with which the Supreme Court has protected them, the Special Master was justified in applying a "clear and convincing evidence" test in this action.

D. Adverse Inferences

The defendant CWA also objects to the adverse inferences drawn by the Special Master from the failure of the CWA to produce 30 employees of CWA to testify regarding their allocation of time to permissible projects. There is no contention here that the defendant could not produce the witnesses, and the Special Master found that the plaintiffs had produced evidence indicating that "most of the 30 employees mentioned . . . are presently engaged in activities which are not 'collective bargaining, contract administration, and grievance adjustment.'" (Paper No. 114 at 22). Thus, the adverse inference rule was correctly applied. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263 (2nd Cir. 1981); *Blow v. Compagnie Maritime Belge*, 395 F.2d 74 (4th Cir. 1968).

The defendant CWA also contends that the Special Master drew impermissible adverse inferences from the failure of the CWA to maintain adequate time records as suggested in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Allen, supra*. While it is true that the Special Master admonished the CWA for failing to keep its time record (Paper No. 118 at 23-24), his decision was, nevertheless, based, not on adverse inferences from the non-production of such records, but on the finding that without them CWA failed to meet its burden of proof, *id.* at 24.

E. Miscalculations

The Special Master determined that the dollar amounts of permissible expenditures for collective bargaining, contract administration, and grievance adjustment, equaled $4,424,000 in a total expenditure of $29,240,000. Likewise, the Special Master determined expressly that $5,052,000 of the total administrative expenses of $8,065,000 were permissible (Paper No. 114, Appendix D), but a portion of these "permissible" administrative expenses were attributable to impermissible activities in the same proportion that all non-administrative permissible activities bore to non-administrative impermissible activities. (The point raised by the plaintiffs (Paper No. 203 at 27) is well taken. The administrative expenses of $5,052,000 characterized as "*permissible*" should have been termed "allocable" to reduce confusion.) Therefore, the Special Master applied the calculation formula supplied by Dr. Bean, an expert produced by CWA, to arrive at the percentage of the total expenditures which constituted permissible expenses and applied that percentage to the allocable administrative expenses to arrive at that part of $5,052,000 which was attributable to collective bargaining, grievance adjustment and contract administration. The total of permissible expenses for collective bargaining, grievance adjustment and contract administration, or $4,424,000, was divided by the total expenditure excluding cost of administration. The Special Master determined that this produced a figure of approximately 24%. (This finding is clearly erroneous as this calculation properly gives a figure of approximately 21%.) Based on the Bean formula, the percentage of allocable administrative cost of $5,052,000 attributable to collective bargaining, grievance adjustment, and contract administration was 24% or $1,212,000. The administrative costs attributable to collective bargaining, grievance adjustment and contract administration thus equaled $1,212,000. This figure added to the costs of collective bargaining, grievance adjustment and contract administration equaled $5,636,000. The percentage of $5,636,000 to the total expenditure is approximately 19% which the Special Master held was the percentage of permissible costs.

Application of the Bean formula has not been shown to be clearly erroneous, but the mathematical computation has. The percentage of permissible non-administrative expenditures to the whole should have been 21%. Twenty-one percent of $5,052,000 is $1,060,920 producing a total of permissible expenditures of $6,112,920 which produces a

percentage of permissible expenditures of 21% ($6,112,920 divided by $29,240,000). The total impermissible expenditure is, thus, 79% (100% minus 21%).

F. Application of Calculation to Years Other Than 1978

The plaintiffs argued on recommittal that the 19/81 percentages (now 21/79) could not be applied to any year other than 1978. The Special Master concluded, however, that Dr. Bean's assertion that 1978 was a typical year was credible (Paper No. 114 at 8 and 13). The plaintiffs have cited the court to no evidence rebutting this finding and, therefore, the court does not find it clearly erroneous.

G. Injunctive Relief

All parties object to the injunction as proposed by the Special Master. (Paper 182 at 51-52). The defendants' proposed modifications are premised on issues addressed previously and need not be repeated here as the court has rejected them for the reasons stated. The plaintiffs' primary objection is that the proposed injunction is too vague to fall within the clear and precise standards applicable to First Amendment issues. The scheme accepted by the Special Master is admittedly not precise and clear, but it does fit within the stated expectations of the Supreme Court in *Allen, supra* at 122, that "absolute precision in the calculation of [the proportion of political to total union expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." The Supreme Court's caveat is equally applicable in this constitutional challenge as it was in the statutory challenge before the *Allen* court.

The plaintiffs also take exception to the language of the Special Master which suggests how the defendants may meet their burden in the future. Such language is *dicta* and as such the court considers it, if erroneous, to be harmless.

H. Costs Allocation

The plaintiffs protest the allocation of 19% of the cost to them as prevailing parties. The court finds this protest well founded and

pursuant to Rule 53(a), Fed. R. Civ.P., will direct that the defendants pay the entire amount of compensation of the Special Master.

I. Clerical Errors

There being no objection by any of the parties, the corrections of the two clerical errors noted in the court's Order of recommittal are adopted. (Paper No. 103 at 8).

CONCLUSION

The original report of the Special Master (Paper No. 114) as modified by the supplemental report of the Special Master (Paper No. 182) is adopted with the modifications expressed herein.

Judgment will be entered against the defendants and in favor of the plaintiffs for the agency fees paid from January 1, 1976 to August 18, 1980 in the following amounts:

Doris Ambrose	$340.89
Jacqueline S. Brandon	$340.89
Rue Downey	$184.86
Kathleen Heil	$126.40
Clay Lutz	$184.86
Roland Merkle	$224.36
Doris Morrow	$104.28
Frances Philips	$324.07
Lois Stallings	$324.07
Harry Swartz, Jr.	$328.26
John Hurley	$444.41
Harriet Lipschultz	$441.53
Barbara McGaughey	$ 86.90
Marion Northrop	$441.53
Mary Anna Cox	$283.63
Ethel Merryman	$308.50
Vivian Reedy	$282.82
Barbara Russell	$319.18

Judgment will also be entered for the plaintiffs listed above against the defendants for 79% of the agency fees paid from August 18, 1980 to

March 31, 1983. By separate order, the plaintiffs will be required to submit affidavits setting forth the amount of agency fees paid during this period.

Judgment will also be entered in favor of the plaintiffs granting them permanent injunctive relief.

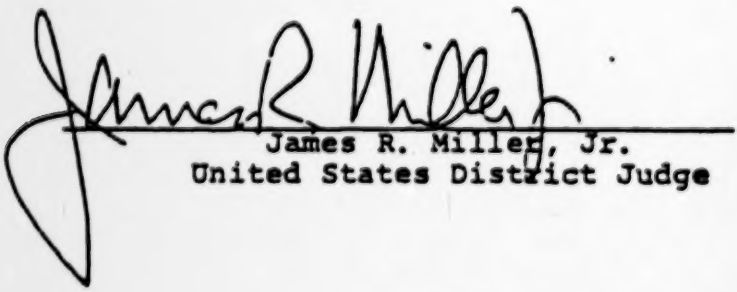
Judgment will be entered for plaintiffs against defendants for 100% of costs, including compensation of the Special Master. Because the parties have to date each paid 50% of said compensation, the plaintiffs will be ordered to advise the court of the total compensation to enable the court to enter judgment for plaintiffs for the amount paid by them.

Accordingly, it is this 4th day of March, 1983, by the United States District Court for the District of Maryland, ORDERED:

(1) The plaintiffs shall submit affidavits setting forth the amount of agency fees paid from August 18, 1980 to March 31, 1983 within twenty (20) days of the date of this Order.

(2) The plaintiffs shall advise the court of the total compensation paid or owed the Special Master by them within twenty (20) days of the date of this Order.

(3) The Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.



James R. Miller, Jr.
United States District Judge